matrimonial asset to be used for their joint benefit.

It also seems clear from the evidence that both the Penang property and the SJ2 house were purchased by the petitioner but was registered in their joint-names. The respondent did not financially contribute to the purchase, but subsequently became the sole registered owner of the Penang property. From this it can be deduced that she was given her fair share of the properties without having financially contributed for their purchase during marriage. Looking it broadly, in my opinion, it represents a fair assessment of her past contributions in caring for the home and looking after the five children of the marriage. Yet, having got this property she still maintained that the SJ1 house was hers and disposed it for RM150,000. The petitioner appeared very accommodating. He was not asking for the full amount of the proceeds of sale of the SJ1 house. But felt that he was entitled to the half share which is RM75,000 from her, which to me is fair and reasonable.

Therefore, in the circumstances of the whole case and upon the considerations of subsection (4) of s. 76 of the Act, in my judgment, I allow this application as prayed. Each party shall pay his own costs .

KSM INSURANCE BERHAD

v.

CHIN TING SING CONSTRUCTION CO. & 6 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[SAMAN SIVIL NO. D5-22-395-90]
13 AUGUST 1992

CONTRACT: Privity of contract - Whether party not privy to principal contract can sue under an Insurance Performance Guarantee executed in pursuance of the contract - Termination of contract by agent - Whether wrongful.

GUARANTEE AND INDEMNITY: Whether conditional - Whether arbitration clause in principal contract can be raised in proceedings under the guarantee and indemnity.

PRACTICE AND PROCEDURE: Summary judgment - Plaintiff not replying to allegations raised in defendant's affidavit - Effect of.

The plaintiff sued the defendants on a letter of indemnity which the defendants had executed in return for the plaintiff executing an Insurance Performance Guarantee with the Government of Malaysia. The plaintiff obtained summary judgment on their claim and the first, second, third, sixth and seventh defendants appealed against the decision of the SAR.

Learned Counsel for the defendants submitted that as the principal contract was between the Government of Malaysia and the first defendant, no other party not privy to the contract could sue under the Performance Guarantee as the contract and the benefit and power to claim under the Performance Guarantee was neither assignable nor transferable.

Counsel further submitted that the Performance Guarantee was conditional and the plaintiff had first to inquire whether the first defendant was relieved from performance before making any payment under it.

It was also contended on behalf of the defendants that the claim made against the plaintiff was by the State Government of Sarawak who were not a party to the contract and as such the termination of the contract and the payment made by the plaintiff were wrongful.

Learned Counsel for the second and seventh defendants also submitted that his clients had only signed the letter of indemnity based on the promise by the first defendant that the subcontract was to be given to them but since this promise was not kept subsequentlyly, they were not liable to furnish the indemnity.

Held:

[1] The Director of Public Works Sarawak had signed the relevant contract agreement with the first defendant and the Performance Guarantee with the plaintiff for and on behalf of the Government of Malaysia. It was therefore quite in order and not improper for the same officer to terminate the first defendant's employment and to require the plaintiff to pay to the Government of Malaysia the said sum under the Performance Guarantee.

[2] The plaintiff was a party to the Performance Guarantee and could certainly sue on it.

[3] The Performance Guarantee was an unconditional or on-demand performance bond which was so drafted that the plaintiff became liable on demand. The issue of having to resort to arbitration did not implicate the plaintiff and could not be raised in these proceedings.

[4] The sixth defendants affidavit merely attempted to reply to the plaintiff's earlier affidavit and by the time it was filed the SAR had decided in favour of the plaintiff. There was no necessity for the plaintiff to reply in the circumstances.

[Defendants' appeal dismissed with costs].

Cases referred to:

Overseas Investment Private Limited v. Anthony William O'Brien & Anor. [1988] 2 CLJ 238 ***(foll)***

R.D. Harbottle (Mercantile) Ltd. & Anor. v. National Westminster Bank Ltd. & Ors. [1977] 2 All ER 862 ***(foll)***

Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All ER 976 ***(foll)***

Other source referred to:

James O'Donovan & John C. Phillips, The Modern Contract of Guarantee, p. 605.

For the plaintiff/respondent - Munir Abdullah; M/s. Jagjit Singh & Co.

For the 2nd & 7th defendants/appellants - Christie Soosay Nathan; M/s. Christie Soosay Nathan & Associates

For the 1st & 6th defendants/appellants - James Selva; M/s. James Selva & Co.

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

The first defendant had entered into an agreement with the Government of Malaysia on the 24 September 1987 for the upgrading, improvement and bitumen surfacing of the Sibu-Ulu Batang Oya/Mukah/Balingian-Bintulu Trunk Road, Package 1, Ulu Batang Oya-Ulu Batang Mukah Section, Sibu Division in Sarawak identified as Contract No. PWD/HO/B118/1987. On the 21 December 1987, at the request of the first defendant and in consideration of premium paid to the plaintiff, the plaintiff had executed an Insurance Performance Guarantee to the Government of Malaysia (hereinafter the "Gerenti Perlaksanaan"). On that same date, all the seven defendants had individually executed a letter of indemnity with the plaintiff to indemnify them in respect of the Gerenti Perlaksanaan with regard to all actions, proceedings, liabilities, claims, damages, costs and expenses arising thereto. The amount stated in the Gerenti Perlaksanaan and the individual letters of indemnity was RM683,012.40 (hereinafter "the said sum").

By letter dated 19 June 1989 signed by the Director of Public Works, Sarawak, the Government of Malaysia had given notice to the plaintiff in accordance with the Gerenti Perlaksanaan that the first defendant had failed to perform the said contract and exercising their rights under clause 2(2) of the Gerenti Perlaksanaan had demanded payment from the plaintiff for the said sum within three months of the said letter. The said sum was paid by the plaintiff to the Government of Malaysia through the Sarawak Public Works Department on the 22 Sepetember 1989. Registered individual letters of demand dated the 27 November 1989 for the first, second and third defendants respectively and dated the 28 November 1989 for the fourth, fifth, sixth and seventh defendants respectively had been accordingly sent by the plaintiff asking the seven defendants to indemnify them for the said sum paid to the plaintiff.

By summons in chambers filed on the 25 September 1990, the plaintiff had applied for summary judgment against all the defendants. The learned Senior Assistant Registrar had granted the said application on 30 May 1991. Before me, the first, third and sixth defendants

had filed an appeal against that decision on the 1 June 1991 and the second and seventh defendants had separately done likewise on the same date. I had dismissed both these appeals with costs on 8 July 1992 and now only the second and seventh defendants are appealing against my decision.

Basically, the main thrust of the arguments of both learned Counsel for the first and sixth defendants (apparently the third defendant had not followed up with instructions) and learned Counsel for the second and seventh defendants is that if the contract is between the Government of Malaysia and the first defendant, no other party not privy to the contract can sue under the Gerenti Perlaksanaan as the contract and benefit and the power to claim under the Gerenti Perlaksanaan is neither assignable nor transferable. Their stand was that only the Government of Malaysia could sue under it. This appears to me to be a preposterous argument since the plaintiff is actually a party to the Gerenti Perlaksanaan and therefore certainly can sue on it. They had further submitted that the Gerenti Perlaksanaan was a conditional guarantee and the plaintiff had first to inquire whether the first defendant was relieved from performance before making any payment under it. They had also referred to the arbitration clause under the agreement between the Government of Malaysia and the first defendant which had yet to be resorted to.

Since the letter of termination is from a person not a party to the contract, they maintained that the termination was wrongful and that the plaintiff had paid the said sum wrongly to the State Government of Sarawak. This was because, their contention was, that the claim made against the plaintiff by letter dated 19 June 1989 was not by the Government of Malaysia but by the State Government of Sarawak. Accordingly, the said sum had been paid to the State Government of Sarawak which was not a party to the contract although they conceded that it was an officer from the State Government of Sarawak which had signed the contract. Learned Counsel for the second and seventh defendants, in addition, had submitted that they had only signed the letter of indemnity based on the promise by the first defendant that the sub-contract was to be given to them but since this promise was not kept subsequently, they were not liable to furnish the indemnity.

Except for the plaintiff which has its office in Kuala Lumpur, all the defendants are residing, and the actual road works are, in Sarawak and to my mind it would have been more appropriate for this case to have in fact been filed and heard in the High Court in Kuching rather than in the High Court in Kuala Lumpur. Be that as it may, it is relevant to observe that it is the Director of Public Works, Sarawak who had signed for and on behalf of the Government of Malaysia both in the relevant contract agreement with the first defendant and in the Gerenti Perlaksanaan with the plaintiff. In the circumstances, the appealing defendants surely cannot now argue that the Director of Public Works, Sarawak was not signing as agent of the Government of Malaysia especially so when all the contract works relate to road construction in Sarawak. It follows then that it was quite in order and not improper for the same officer to terminate the first defendant's employment on 9 June 1989 under clause 30 of their agreement and to require the plaintiff to pay to the Government of Malaysia the said sum under clause 2(2) of the Gerenti Perlaksanaan by letter dated 19 June 1989.

As stated by James O'Donovan and John C. Phillips in their book **The Modern Contract of Guarantee** at page 605 there are two types of performance bonds. The first is the conditional performance bond whereby the guarantor only becomes liable upon proof of a breach of the terms of the principal contract by the builder and the owner sustaining loss as a result of such breach which is not applicable here and the second is an unconditional or on-demand performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the owner which to my mind applies here. The plaintiff therefore is not concerned with the dispute between the Government of Malaysia and the defendants or as between the defendants among themselves.

This had been given judicial sanction in *R.D. Harbottle (Mercantile) Ltd. & Anor. v. National Westminster Bank Ltd. & Ors.* [1977] 2 All ER 862 where it was held that the bank which gave the performance guarantee was only concerned to ensure that the terms of its mandate and confirmation had been complied with and it was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Similarly in

Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All ER 976 it was ruled that where a bank had given a performance guarantee it was required to honour it according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. Both cases had propounded that a performance bond was similar to a confirmed letter of credit. Consequently, the issue here of having to resort to arbitration does not implicate the plaintiff and certainly cannot be raised in these proceedings.

Much had been said about the plaintiff not replying to the allegations raised by the sixth defendant in his affidavit filed on 30 August 1992 and therefore deemed to be admitted following *Overseas Investment Private Limited v. Anthony William O'Brien & Anor.* [1988] 2 CLJ 238 but all what that affidavit has attempted to do was to reply to the plaintiff's affidavit dated 22 September 1990. In the interim period, the learned Senior Assistant Registrar had decided on the matter on the 30 May 1991 and had decided in favour of the plaintiff. It was therefore my view that there was no necessity for the plaintiff to reply to the affidavit in the circumstances.

As far as the plaintiff was concerned, they had to pay the Government of Malaysia on demand and it was not their duty to question the terms of the contract between the Government of Malaysia and the defendants. Further, the Director of Public Works, Sarawak had acted for and on behalf of the Government of Malaysia in all the documents and correspondence and there was no necessity or reason for the plaintiff to question his authority in his capacity as agent for the Government of Malaysia. Consequently, all the issues raised by the appealing defendants here may be relevant triable issues between them and the Goverment of Malaysia but it certainly does not concern the plaintiff in their claim. I had therefore accordingly dismissed the two appeals with costs.

LEE HENG KOOI

v.

PUBLIC PROSECUTOR

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL REVISION NO. 43-16-92]
31 OCTOBER 1992

CRIMINAL PROCEDURE: Jurisdiction - Subordinate Courts - Section 85 of Subordinate Courts Act 1948 - Whether First Class Magistrate's Court can try offences which also provides whipping as punishment - Section 397 of Penal Code.

INTERPRETATION OF STATUTES: Construction of ss. 85 and 87 Subordinate Courts Act - Scope of s. 40(1) of Interpretation Act 1967 - Whether s. 40(1) ought to be invoked only in respect of procedural or administrative matters.

This was a criminal revision referred to the High Court under s. 323 of the Criminal Procedure Code by Karpal Singh, the defence Counsel for the applicant on the issue whether s. 85 of the Subordinate Courts Act 1948 confers upon the First Class Magistrate's Court, jurisdiction to try offences which also provide for a sentence of whipping.

This point was raised as a preliminary issue at the Magistrate's Court at the trial of the applicant who was charged for an offence under s. 397 of the Penal Code which also provides for a sentence of whipping. The learned Magistrate had dismissed the preliminary objection.

Held:

[1] Section 87 of the Subordinate Courts Act 1948 which provides that a Magistrate may pass any sentence allowed by law not exceeding whipping of 12 strokes (in combination with any of the other sentences) should be read in conjunction with the said opening phrase in s. 85 of the said Act. Thus, the legislature had obviously intended, by the phrase "Subject to limitations contained in this Act, a First Class Magistrate shall have jurisdiction to try..." to mean "Subject to the sentences within competence of the First Class Magistrate to pass any sentence (*inter alia*) of whipping of up to 12 strokes, a First Class Magistrate shall have jurisdiction to try...". This would make for a more comprehensive interpretation of s. 85, as encompassing within its ambit, offences which also provide for a sentence of whipping.